



*Abdul-Hakim Belhaj and ors v MI5, MI6, GCHQ and ors*  
**MI5/MI6/GCHQ policies on lawyer-client spying: briefing document**  
**6 Nov 2014**

**Case background**

In 2011, documents found in Tripoli exposed a joint UK-US-Libyan [plot](#) to abduct senior Gaddafi opponents Abdul-Hakim [Belhaj](#) and Sami [al-Saadi](#) from Southeast Asia and ‘render’ them – with their families – to Libya.<sup>1</sup> Lawyers at Reprieve and Leigh Day represent the two families in several cases arising from this kidnap.

In 2012 the families brought civil [claims](#) against the UK government, Sir Mark Allen, and then-Foreign Secretary Jack Straw MP. The al-Saadi family subsequently [settled](#) their civil claim but continue to pursue [litigation](#) in Hong Kong. Mr Belhaj and Mrs Boudchar’s civil case is ongoing, as is a Scotland Yard [investigation](#) into the British role in the kidnappings.

Both families are currently involved in legal proceedings against the UK government and others. They need to communicate regularly with legal advisors. They have the right to do so in private.

**The IPT claim**

After NSA whistleblower Edward Snowden exposed the scale and breadth of the US and UK intelligence agencies’ mass spying operations – and after suspicious technical problems – a concern arose that the families’ private discussions with Reprieve and Leigh Day were being intercepted, and that privileged information was potentially being misused.

In late 2013, the families filed a claim in the Investigatory Powers Tribunal. They say that MI5, MI6, and GCHQ have **ineffective and unlawful policies for the protection of ‘legal professional privilege’**, or LPP. They also say **private lawyer-client information may have been illegally misused** by government lawyers or officials involved in their torture cases.

For months the government claimed that their policies on seizure and use of LPP material could not be disclosed because to do so would damage ‘national security’. Last week, less than two hours before a hearing at which it appeared the government might be ordered to disclose these policies over its objection, the government reversed course. It has now disclosed **extracts from MI5, MI6, and GCHQ’s policies on lawyer-client spying**. Those policies are attached to this briefing.

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<sup>1</sup> One of the Tripoli files indicates that MI6’s then-head of counter-terrorism, Sir Mark [Allen](#), provided the intelligence [tip](#) that set off the operation. At the time of the kidnap, Mr Belhaj’s wife, Fatima Boudchar, was five months [pregnant](#). Mr al-Saadi was rendered with his wife and four children between the ages of six and [twelve](#). Both men faced years of torture in Libyan prisons.

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### What is 'legal professional privilege' (LPP)?

LPP is the right to communicate in private with a lawyer. The principle is one of the oldest and most sacrosanct features of English common law, well-established and respected since at least the 16<sup>th</sup> century.<sup>2</sup> It is essential to the rule of law and the fair administration of justice.

LPP is important for everyone because we should all be able to get confidential advice about our legal rights and obligations. No one involved in a legal claim is allowed to eavesdrop on the other side's private legal conversations to obtain an unfair advantage.

### What policies do the intelligence services have regarding private lawyer-client information?

Each service (MI5, MI6, GCHQ) has its own policies on what to do with lawyer-client material. The policies have changed over time and are inconsistent with one another, but in general the policies show:

#### **1. The intelligence agencies intentionally target – and use – LPP material.**

GCHQ, for example, advises its personnel that *"you may in principle target the communications of lawyers"* E15, §19.

MI5 states that *"In principle, and subject to the normal requirements of necessity and proportionality, LPP material may be used just like any other item of intelligence"* E3, §12.

**In at least one instance privileged information *has* been inappropriately passed to lawyers involved in litigation against the agencies** where, in the government's words, *"the potential for 'tainting' was identified"*. (Government Response to RFI at para. 28). No full checks have yet been carried out, so this incident may well be one of many.

This creates a real problem. If the intelligence agencies spy on lawyers, how can we be sure they don't get an unfair advantage when they are involved in a criminal or civil case?

#### **2. Until recently, the intelligence agencies had no proper information barriers to prevent intercepted lawyer-client communications from being shown to lawyers or government officials involved in cases against the intelligence agencies.**

Until recently, the intelligence agencies had policies that allowed their lawyers and officials to see intercepted privileged material about cases they were involved in. The barriers still have problems, but most troubling is that before recently there were no barriers to speak of at all.

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<sup>2</sup> The earliest known reference to the right to LPP is thought to be the decision in *Berd v Lovelace* (1577).

For example, the flawed policies applied in the *Belhaj* litigation until earlier this year, when the families sought – and obtained – undertakings from the government to use more effective procedures to protect their privileged material. So in the years before the undertakings were offered, information may have been improperly passed to lawyers and officials involved with the Libyan torture cases.

This claim also seems to have prompted some new policies, and the introduction of some information barriers. These are the first major changes to UK intelligence policies known to have resulted from the Edward Snowden revelations. But the new policies are still flawed.

### **3. Much information that is privileged is not treated as such by the intelligence agencies.**

The position of the GCHQ, for example, is that ‘events’ data is not privileged (E20). An ‘event’ includes the fact of contact between a client or a witness and a lawyer.

For example, when Reprieve lawyers met witnesses in various countries while investigating these torture claims, the intelligence agencies considered that the *fact* of the meeting between Reprieve and a potential witness was not privileged material. This is wrong. Just as for journalists, the identity of sources and witnesses is information that is protected.

**This means the government’s defense team in the Libya torture claims has potentially been told which witnesses Reprieve interviewed.**

#### **Other problems**

Each agency has particular problems with its policies.

#### **MI5 (Exhibits 1-10)**

**In December 2010, MI5 created information barriers, only to abandon them entirely in April 2011 until January 2014, presumably in response to this claim.**

For almost three years, MI5 allowed its lawyers involved in defending claims to read the privileged communications between the lawyers and clients and witnesses on the other side (E20/14).

**Agents were instructed to consult with Counsel in control order/SIAC cases about whether to use LPP material.**

This suggests that barristers acting for the government in these cases may have been asked to review private lawyer-client material. E7 (\$30). It is clear from the same document that MI5 did not consider themselves bound to inform the Court or parties when their lawyers *did* review LPP material.

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### MI6 (Exhibits 11-13)

MI6 has virtually no guidance for its officers on the interception and use of private lawyer-client material. Such policies as they do have are dated September 2011, the month the Libyan renditions documents became public.

Another undated document, E12, contains a carve-out suggesting that it would be appropriate for MI6 to ignore protections for privileged material if documents identifying agents (as in the HRW documents) are in the hands of 'extremists'. It is expected that this carve-out was drafted for use in this very case.

### GCHQ (Exhibits 14-28)

GCHQ has had policies on LPP material since 1999, which are the oldest policies disclosed to us. The older policies were more robust, containing a flat prohibition on sharing privileged material with 'customers' (other agencies or law enforcement) involved in litigation. In 2010, this policy was relaxed (E24).

### What are the implications of the documents?

#### For the Libyan families in this case:

1. **There is a real risk that privileged information has contaminated lawyers or government advisers in the civil claims.**
2. **The policies have been recently changed apparently in response to issues in this case.** But, given the failures of the policies in place for the first several years of the litigation, the damage may already have been done.

#### In general

1. Lawyers for control order clients or in criminal cases may wish to consider whether they may have been victims of these inadequate policies and whether their clients have been the victims of abuse of process.
2. Any lawyer who acts for clients who have information that might be of interest to the intelligence agencies should be concerned that their private lawyer-client communications were not respected.

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